

## Fordham Urban Law Journal

---

Volume 39

Number 5 Symposium - Gun Control and the Second  
Amendment: Development and Controversies in the  
Wake of *District of Columbia v. Heller* and *McDonald*  
*v. Chicago*

Article 7

March 2016

# Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Stevens's Heller Dissent

Nicholas J. Johnson

*Fordham University School of Law*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Jurisprudence Commons](#), [Law and Philosophy Commons](#), [Second Amendment Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Nicholas J. Johnson, *Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Stevens's Heller Dissent*, 39 Fordham Urb. L.J. 1503 (2012).  
Available at: <https://ir.lawnet.fordham.edu/ulj/vol39/iss5/7>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# RIGHTS VERSUS DUTIES, HISTORY DEPARTMENT LAWYERING, AND THE INCOHERENCE OF JUSTICE STEVENS'S *HELLER* DISSENT

*Nicholas J. Johnson\**

|   |      |
|---|------|
| Introduction .....  | 1504 |
| I. Explaining Away the Individual Right to Arms Version 1.0:<br>The States' Rights Second Amendment. ....           | 1506 |
| II. Explaining Away the Individual Right to Arms Version<br>2.0: Justice Stevens's "Individual Militia Right" ..... | 1507 |
| III. Redeeming Version 2.0: A Substantive Individual Militia<br>Right? 1513   |      |
| IV. Justice Stevens Concurs? .....  | 1518 |
| V. A Note About Counting and Some Lesser-Known Versions<br>of the Hollow Second Amendment.....                      | 1521 |
| A. A Leading Historian Says the Second Amendment<br>Means Nothing at All .....                                      | 1521 |
| B. The "Real" but "Secret" Meaning of the Second<br>Amendment .....   | 1522 |
| C. A Narrow Definition of Militia Exposes the<br>"Individual Militia Right" .....                                   | 1523 |
| D. Collective Rights: A Gloss on States' Rights.....  | 1524 |
| E. A Second Amendment Hollowed Out by<br>Neorepublicanism .....   | 1524 |
| F. A Prize Winning Historian Says American Gun<br>Culture (and Thus the Right to Arms) Is Myth.....                 | 1525 |
| G. The Tally .....  | 1526 |
| Conclusion.....   | 1526 |

---

\* Professor of Law, Fordham University School of Law, J.D., Harvard Law School, author of *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY* (2012) (with Kopel, Mocsary, and O'Shea).

## INTRODUCTION

The individual right to keep and bear arms is settled law for now. In *District of Columbia v. Heller*,<sup>1</sup> the Supreme Court reconciled the two clauses of the Second Amendment, reasoning that the amendment protects an individual right of the people from whom the militia is to be drawn. This comports with the centuries-old understanding of the militia as the body of the people, who when called for duty are expected to appear bearing arms provided by themselves, in common use at the time.<sup>2</sup> As for the boundaries on the right to arms, the Court took an approach common for understanding the Bill of Rights<sup>3</sup>—that the right to arms predated the Bill of Rights.

---

1. 554 U.S. 570 (2008).

2. *Heller*, 554 U.S. at 624–25. This common use standard is one of the primary substantive contributions that the prefatory clause makes to our understanding of the Second Amendment. A straightforward application of the common use standard would resolve a variety of questions in a predictable way. See generally Nicholas J. Johnson, *Administering the Second Amendment: Law, Politics, and Taxonomy*, 50 SANTA CLARA L. REV. 1263 (2010) (discussing the demands and limits of the common use standard). So far, lower courts interpreting *Heller* have not embraced this straightforward application of the common use standard, and one notable decision has rejected the idea that guns in common use cannot be banned. See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1261 (2011).

3. This is no novel assessment, as explained by Justices Brennan and Marshall dissenting in *United States v. Verdugo-Urquidez*.

In drafting both the Constitution and the Bill of Rights, the Framers strove to create a form of Government decidedly different from their British heritage. Whereas the British Parliament was unconstrained, the Framers intended to create a Government of limited powers. See B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 182 (1967); 1 *THE COMPLETE ANTI-FEDERALIST* 65 (H. Storing ed. 1981). The colonists considered the British Government dangerously omnipotent. After all, the British declaration of rights in 1688 had been enacted not by the people, but by Parliament. *THE FEDERALIST* No. 84, p. 439 (M. Beloff ed., 1987). Americans vehemently attacked the notion that rights were matters of “favor and grace,” given to the people from the Government. B. Bailyn, *supra*, at 187 (quoting John Dickinson).

Thus, the Framers of the Bill of Rights did not purport to “create” rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing. See, e.g., U.S. Const., Amdt. 9 (“The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people”). The Fourth Amendment, for example, does not create a new right of security against unreasonable searches and seizures. It states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” The

2012]

## RIGHTS VERSUS DUTIES

1505

So the stated purpose for the codification (facilitating the militia) did not define the boundaries of the pre-existing right. The Court discerned the American right to arms for self-defense rooted significantly in the rights of Englishmen and the 1689 English Bill of Rights.<sup>4</sup> This approach reflects the “standard model” of Second Amendment scholarship.<sup>5</sup>

Many still object to *Heller* and envision the day when it will be overturned. Speaking at the Harvard Club of Washington, D.C. on December 17, 2009, Justice Ginsburg expressed her hope that Justice Stevens’s dissenting opinion in *Heller* will become the majority opinion of a “future, wiser Court.”<sup>6</sup> Writing for this Symposium, Richard Aborn and Marlene Koury draw on Justice Ginsburg’s criticism to imagine more precisely how the Court might overturn *Heller*.<sup>7</sup> Other critics of *Heller* who presumably would be happy to see it overturned have included Judge J. Harvie Wilkinson,<sup>8</sup> Judge

---

focus of the Fourth Amendment is on what the Government can and cannot do, and how it may act, not on against whom these actions may be taken. Bestowing rights and delineating protected groups would have been inconsistent with the Drafters’ fundamental conception of a Bill of Rights as a limitation on the Government’s conduct with respect to all whom it seeks to govern. It is thus extremely unlikely that the Framers intended the narrow construction of the term “the people” presented today by the majority.

494 U.S. 259, 287-88 (1990) (Brennan, J., dissenting) (emphasis omitted).

4. *Heller*, 554 U.S. at 592-94.

5. See Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463 (1995) (adopting the term “standard model” to describe this dominant theory of the Second Amendment).

6. David Kopel, *Justice Ginsburg: Supreme Court May Eventually Overrule Heller*, VOLOKH CONSPIRACY (Dec. 20, 2009, 12:58 PM), <http://volokh.com/2009/12/20/justice-ginsburg-supreme-court-may-eventually-overrule-heller>; Chris Cox, *Michelle Obama’s Warning to Gun Owners*, THE DAILY CALLER (Oct. 11, 2012, 9:41 AM), <http://dailycaller.com/2011/10/11/michelle-obamas-warning-to-gun-owners>.

7. See Richard Aborn & Marlene Koury, *Toward a Future, Wiser Court: A Blueprint for Overturning District of Columbia v. Heller*, 39 FORDHAM URB. L.J. 1353 (2012). The Aborn & Koury article draws on *Brown v. Board of Education*, 347 U.S. 483 (1954), *Loving v. Virginia*, 388 U.S. 1 (1967), and *Lawrence v. Texas*, 539 U.S. 558 (2003), and their relationship to the cases they overturned, *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Pace v. Alabama*, 106 U.S. 583 (1883), and *Bowers v. Hardwick*, 478 U.S. 186 (1986). See *id.* It is interesting that Mr. Aborn and Ms. Koury model their critique on cases that are famous for the controversial expansion of individual rights and limitation of state power that infringed those rights. These cases are hardly counterpoints to *Heller*. Indeed, as controversial affirmations of individual rights, they fit comfortably in the same basket as *Heller*.

8. See J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009).

Richard Posner,<sup>9</sup> and Richard Epstein.<sup>10</sup> During the Symposium proceedings, one historian chided that *Heller* is clearly wrong but is a fun case to teach because it is so silly. More broadly, many others who criticize *Heller* view our armed society as a profound collective mistake or object that *Heller* upsets decades of lower court practice and precedent.<sup>11</sup>

The majority opinion in *Heller*, as a guide to courts and as an impetus for policy changes, naturally has received most of the attention. But lurking in the background is the dissenters' alternative construction of the Second Amendment that critics implicitly contend is a better, wiser, truer rendition of the right to keep and bear arms. That construction is equally deserving of a critical assessment. That is the intent of this Article.

# **I. EXPLAINING AWAY THE INDIVIDUAL RIGHT TO ARMS VERSION 1.0: THE STATES' RIGHTS SECOND AMENDMENT.**

In their effort to explain away the Second Amendment, critics of *Heller* fall into two broad categories. The first group consists of people who have glancing familiarity with the cases but have not studied them. These critics would describe the Second Amendment as a kind of federalism provision that only protects the states' right to maintain or arm state militias. This states' rights view was a prominent part of the jurisprudence of the lower federal courts from the 1940s through 2008. The Third Circuit confidently articulated this view in *United States v. Tot*,<sup>12</sup> one of the first lower court cases claiming to apply the Supreme Court's 1939 decision in *United States v. Miller*.<sup>13</sup> Citing nothing but *Miller*, the *Tot* court declared:

It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for protection of free speech and freedom of religion, *was not*

---

9. See Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32.

10. See Richard A. Epstein, *The Libertarian Gun Fallacy*, DEFINING IDEAS (Jan. 31, 2012), <http://www.hoover.org/publications/defining-ideas/article/106796>.

11. See, e.g., Michael B. de Leeuw, *Ready, Aim, Fire?* District of Columbia v. *Heller and Communities of Color*, 25 HARV. BLACKLETTER LAW J. 133, 142-48 (2009); William G. Merkle, *Heller as Hubris, and How McDonald v. City of Chicago May Well Change the Constitutional World As We Know It*, 50 SANTA CLARA L. REV. 1221, 1225 n.15 (2010).

12. 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

13. 307 U.S. 174 (1939).

2012]

*RIGHTS VERSUS DUTIES*

1507

*adopted with individual rights in mind, but as a protection for the states in the maintenance of their militia organizations against possible encroachments by the federal power.*<sup>14</sup>

Over the years, scores of cases and nearly every Circuit Court of Appeals cited *Tot*.<sup>15</sup> Many casual critics of *Heller* still embrace the *Tot* approach.<sup>16</sup> These critics generally will not have studied the opinions in *Heller*, because if they had, they would realize that the states' rights view of the Second Amendment—that staple of popular objection to the individual right—is neither advanced nor defended by any of the nine Justices in *Heller*. Neither Justice Breyer nor Justice Stevens adopts it in dissent. This surprises some of the glib *Heller* critics and leaves them doctrinally out of sync with their ideological cohorts.

Richard Epstein, for example, opined in January 2012 that the *Heller* majority is wrong, arguing that, “[t]he point of the amendment is to deal with the interactions between the federal government and the states in ways that leave the states free and clear of federal oversight on their own internal regulation of the use of firearms.”<sup>17</sup> This is a fairly standard articulation of the states' rights Second Amendment, reflecting essentially the position that the Court took in *Tot*.

Epstein advances what I sense is a fairly widespread view among casual *Heller* skeptics, who embrace the states' rights view, perhaps not even appreciating that the *Heller* dissenters have replaced it with another alternative reading of the Second Amendment.

## II. EXPLAINING AWAY THE INDIVIDUAL RIGHT TO ARMS VERSION 2.0: JUSTICE STEVENS'S “INDIVIDUAL MILITIA RIGHT”

One cannot know with certainty why the *Heller* dissenters jettisoned the states' rights interpretation of the Second Amendment. The linguistic difficulty of transforming a right of the “people” into a

---

14. 131 F.2d at 266 (emphasis added).

15. See, e.g., *Bach v. Pataki*, 408 F.3d 75, n.22 (2d Cir. 2005); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *United States v. Synnes*, 438 F.2d 764, 772 (8th Cir. 1971); *Potts v. City of Philadelphia*, 224 F. Supp. 2d 919, 939 (E.D. Pa. 2002); *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 746 F. Supp. 1415, 1418 (E.D. Cal. 1990).

16. I have discussed *Heller* and the Second Amendment at a variety of events since 2008. This has generated more conversations about the opinion than I can count. In my experience, a majority of the people who think *Heller* is wrong contend that the Second Amendment just protects state militias.

17. Epstein, *supra* note 10.

right of the “states” was always an obvious problem for the states’ rights view, but the lower federal courts embraced it nonetheless.<sup>18</sup> The likely answer is that reading the “right of the people” as a right of the “states” seemed doubly implausible after the Court concluded in *United States v. Verdugo-Urquidez*<sup>19</sup> that “people” was a term of art in the Constitution referring to “a class of persons who are part of a national community.”<sup>20</sup>

To a significant degree, the *Heller* dissenters seem to have adopted the post-*Verdugo* response of the opposition to the Standard Model. After *Verdugo*, the states’ rights view seemed increasingly vulnerable.<sup>21</sup> Out of this worry emerged the individual militia right that Stevens advances. This theory is rooted in early work by Dennis Hennigan of Handgun Control Inc.,<sup>22</sup> and pressed aggressively with regard to *Heller* by historians like Saul Cornell, a participant in this panel.<sup>23</sup> Justice Stevens’s conception of the Second Amendment cites and is evidently grounded in this body of work.<sup>24</sup> So how precisely does Stevens frame the Second Amendment right and is his construction, as *Heller* skeptics would contend, a plainly better, more plausible reading?

At the outset, Stevens dispenses with the idea that the Second Amendment does not protect an individual right. He then frames in

18. See, e.g., *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), and the scores of cases citing it. See also *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (“Since the Second Amendment right ‘to keep and bear arms’ applies only to the right of the State to maintain a militia and not to the individual’s right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm.”).

19. 494 U.S. 259, 265 (1990).

20. The states’ rights argument filled the gap left by rejecting the individual right with a plausible “militia right.” This at least masked the fundamental incoherence of thinking about “militia as right” in the individual context. Some objected that the characterization was flawed because in our constitution states compete with the federal government over powers. But this objection notwithstanding, in the state-federal contest over authority, it was not absurd to talk about a state militia right.

21. See JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT 446–47 (2012).

22. Dennis A. Henigan & Keith A. Ehrman, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989).

23. See, e.g., Saul Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT 221 (1999).

24. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 685 (2008) (Stevens, J., dissenting).

2012]

*RIGHTS VERSUS DUTIES*

1509

general terms a view of the Second Amendment that protects a relatively narrow *individual militia right*.

The question presented by this case is not whether the Second Amendment protects a “collective right” or an “individual right.” *Surely it protects a right that can be enforced by individuals.* But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.

....

[Whether the Second Amendment] protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history and our decision in *United States v. Miller* . . . provide a clear answer to that question.

....

The view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes but that it does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment’s text and the interpretation most faithful to the history of its adoption.<sup>25</sup>

It is useful to pause here try to imagine exactly what this individual “right to keep and bear arms for certain military purposes” actually means.<sup>26</sup> Consider, for contrast, the challenge of envisioning constitutional rights. One can quite easily imagine the core interests protected by the other provisions of the Bill of Rights (including the *Heller* majority’s conception of the Second Amendment) and countless variations and permutations.

In comparison, Stevens’s individual militia right is strangely incoherent. It is nearly impossible to imagine a scenario that triggers it. The majority captures the problem this way: “[I]f petitioners are correct, the Second Amendment protects citizens’ right to use a gun in an organization from which Congress has plenary authority to

---

25. *Id.* at 636-38 (emphasis added). As an aside, Stevens is clearly wrong in his assertion about the meaning of *Miller*. That case focused on whether the weapon in question (a sawed-off shotgun) was protected under the Second Amendment. *United States v. Miller*, 307 U.S. 174, 175 (1939). Nothing in the decision stands for the conclusion that Stevens claims.

26. *Cf.* *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (“Since the Second Amendment right ‘to keep and bear [a]rms’ applies only to the right of the State to maintain a militia and not to the individual’s right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm.”).



exclude them.”<sup>27</sup> In another permutation, Justice Scalia chides that the formulation is “worthy of the mad hatter.”<sup>28</sup>

This assessment is underscored by the effort to give content to Stevens’s individual militia right. Take a few minutes—or a few days. Try to come up with a list of illustrations of the individual militia right in action. Compare that list to what you come up with for the First, Fourth, Fifth, or any of the other Amendments. My experience suggests you will end up with fundamentally different types of lists. In the years since *Heller*, I have asked my seminar students for their views of precisely what the Stevens version of the Second Amendment might mean in operation. It turns out that this is a hard question to answer.<sup>29</sup>

The casual effort to give concrete meaning to Stevens’s individual militia right renders absurdities. Do you have a right to be in the militia even where the state rejects you? Once you are in militia service, are you entitled to bear arms, even where you are ordered to peel potatoes? Are you entitled to bear the arm of your choice, or your personal favorite gun, even where you are ordered to keep or bear something else or nothing? Can you demand that the state call out, muster, and drill the militia even where the authorities have decided against it and prevail in a lawsuit to enforce your demand?<sup>30</sup>

Are we really to believe that the extraordinary machinery of constitutional amendment was deployed for something so amorphous, fleeting and, frankly, nonsensical as this? One wonders whether Stevens is serious. Why is it so difficult to imagine, either today or in the eighteenth century, scenarios that give content to Stevens’s individual militia right?

---

27. *Heller*, 554 U.S. at 600. See generally Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993) (arguing that constitutional rights are conceptually distinguishable from corresponding government power).

28. *Heller*, 554 U.S. at 589; see also *Heller*, 554 U.S. at 592 n.16 (“Contrary to Justice Stevens’s wholly unsupported assertion, there was no pre-existing right in English law ‘to use weapons for certain military purposes’ or to use arms in an organized militia.” (citation omitted)).

29. The individual right to arms as conceived by the *Heller* majority, on the other hand, generates a host of concrete examples that pose the traditional problems of scope that we engage when talking about rights. Stevens’s individual militia right, in comparison, simply does not behave like a right.

30. These absurdities represent the first wave of examples one would imagine without resorting to some sleight of hand that would render the Second Amendment just some kind of standing rule in cases we are left to imagine. I wager that your examples of the individual militia right in action, while they may be different in detail from what I have sketched, are very similar in flavor—filled only with trifles.

*The answer is this: for individuals, the militia is a duty, not a right.*<sup>31</sup> And the difference is quite clear. Rights are things we can insist upon. Duties are things that can be demanded of us. This is why examples of the “individual militia right” seem patently absurd. But that is where Stevens’s formulation pushes us.

Compare the otherwise fatally flawed<sup>32</sup> states’ rights view of the Second Amendment articulated in *Tot*.<sup>33</sup> Under that view, the Second Amendment only protects the states’ right to maintain a militia.<sup>34</sup> What does such a right mean? One could plausibly answer that it means states could maintain their own militias, notwithstanding the potential limitation of Article I, Section 8, or Article I, Section 10 of the Constitution, and could not be prohibited from doing so by the exercise of federal power.<sup>35</sup> This is a function in which the states can engage and have engaged (although more accurately through an exercise of power rather than rights). The glaring flaw of this view was that it wrenched “right of the people” into a right of states. But at least the imagery is coherent.

Stevens’s individual militia right, in contrast, cannot really be envisioned as a right to maintain a militia.<sup>36</sup> If anything, it seems more plausibly cast as a *right to keep and bear arms in, as part of, or in connection to* the militia—or in Stevens’s words, “for certain military purposes.”<sup>37</sup>

31. It was flawed, but plausible, to talk about the state right to have a militia (both federal and state governments can and have had militias). But once it is conceded that the Second Amendment establishes an individual right, the difference between the individual right to arms and the militia duty becomes plain.

32. Its fatal flaw was that it required us to believe “right of the people” meant “right of the states,” even though the Constitution clearly distinguishes between people and states throughout. Indeed, the Court has determined that “people” is a constitutional term of art referring to individual members of the polity. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

33. *See supra* note 14 and accompanying text.

34. This masked the fundamental incoherence of thinking about the militia as a right in the individual context. Some objected that the characterization was flawed because in our Constitution, states compete with the federal government over powers. But this objection notwithstanding, in the state-federal contest over authority, at least it was plausible to envision a state militia *right*.

35. Article I, Section 10 also prohibits states from maintaining troops without the consent of Congress. U.S. CONST. art. I, § 10, cl. 3.

36. That would seem to sanction a solitary militia—a constitutionally authorized army of one. The implications of this idea seem far beyond Stevens’s manifest intent.

37. *Heller*, 554 U.S. at 636. Another possibility is that it gives individuals a right to possess a broad range of militia weapons. But that view seems even more at odds with Stevens’s overall effort. So while it is in some ways revealing to pursue this possibility, it is also distracting.

But even this construction defies reality. The militia is and always has been a duty, not a right. For those who object to my elaboration of Stevens's formulation, I invite any more favorable construction you desire.<sup>38</sup> The only parameter is the acknowledgement that rights constrain the state, rather than carry state commands.<sup>39</sup> So what does it mean for an individual to assert a right that constrains the state in the context of a militia or military over which the state exercises plenary authority?

By failing to appreciate the fundamental distinction between militia as a duty and arms as a right, Stevens renders an empty and incoherent version of the Second Amendment. One imagines that he intended empty, but not incoherent. In an effort to neuter the right to arms, Stevens offers one that fails even as a plausible placeholder for the rejected individual right—a fundamental constitutional right virtually impossible to imagine in operation.

While much is made in this debate about changed circumstances, Stevens's formulation is incoherent even from a historical perspective. Yes, there was plenty of talk about the militia during the latter part of the eighteenth century. But that discussion simply confirms the point. Militia connoted duty, not right. As shown in the next section, the illustrations are countless. Militiamen could be required to possess certain arms and accoutrements. They could be required to enroll. Required to appear. Required to muster. Required to march out, with controversies over how far and for how long. Militiamen could be required to take commands and submit to

---

38. Saul Cornell, for example, attempts to finesse this distinction. Cornell argues that many eighteenth century Americans

understood liberty in terms rather different than those of modern liberal rights-based constitutional theories. Indeed, it is important to recall that the right of gun ownership was connected with an obligation of militia service. Governments could not only compel attendance at militia musters, but the failure to comply could result in fines. In general, modern rights are not subject to these sorts of restrictions and seldom carry with them these types of obligations.

Cornell, *supra* note 23, at 237. His illustrations of duty are clear. The question remains, what, if anything, does his view of the right involve?

39. Some may object that claims of a right to vote or to serve on a jury complicate this parameter. But this actually underscores Justice Scalia's plenary power criticism. Congress cannot abolish elections or juries. In contrast, Article I, Section 8 allows Congress to do exactly that for the militia, rendering the supposed individual militia right entirely hollow. This is also another way of confirming the accuracy of *Heller's* assessment of the militia prefatory clause. The prefatory clause describes the reason for codification of the individual right to arms. But nothing in the prefatory clause mandates a militia or guarantees any right to serve in a militia.

2012]

*RIGHTS VERSUS DUTIES*

1513

military discipline. They could be required to risk and even sacrifice their lives in service of the state. In all these ways, militiamen performed civic duties and were subject to penalties if they refused. But it is nonsense to cast these duties as rights.

### III. REDEEMING VERSION 2.0: A SUBSTANTIVE INDIVIDUAL MILITIA RIGHT?

Those who have fully engaged with my invitation to imagine a substantive individual militia right eventually will discern a narrow set of circumstances where Stevens's formulation might render something recognizable as a right. Perhaps the individual militia right is some kind of individual right to shoot, to train, or to gather for shooting practice or other activity with their individual arms that approximates or facilitates the militia duty.<sup>40</sup>

This individual militia right would be a slim right, compared to the prevailing view in *Heller*, and ironically it might have implications for protected arms and activity (e.g., a right to own and shoot "assault rifles") that Justice Stevens and others would find more troubling than the prevailing view in *Heller*.<sup>41</sup> But it would be a concrete, identifiable right rather than an obligation—an exercise of individual sovereignty that would constrain the state in the way that rights do.

We do not know if this interpretation is what Justice Stevens had in mind, but it is telling that one of the more active proponents of the "individual militia right" emphatically rejects this idea. Patrick Charles, a participant in this program, whose "research was the basis of the English Historians' Amici Curiae brief in *McDonald v. City of Chicago*... [and was] cited by Justice Breyer in the *McDonald*

---

40. This sort of right could even co-exist smoothly with the individual right anticipated by the *Heller* majority. But one guesses Stevens would reject that view.

41. For example, one could plausibly argue that assault rifles, or at least military or military style guns like the M1 Garand (long sold by the federal government to rifle clubs through the Civilian Marksmanship Program) or the AR-15 (semiautomatic version of the military M-16) were constitutionally protected arms under this view. Even restricting the right just to the keeping of guns, such a view would seem to privilege private possession of guns like those that have for now been legitimately banned by legislation that the D.C. Circuit says is consistent with the majority opinion in *Heller*. Again, one imagines that Justice Stevens was not really trying to construct an individual right protecting semiautomatic assault rifles. See also JOHNSON ET AL., *supra* note 21, at 27-36 (showing state right to arms provisions guaranteeing, for example, that "[e]very citizen has a right to bear arms in defense of himself and the state" (citing CONN. CONST. of 1818, art. I, §17)). Within such provisions, there is a range of true individual rights independent of any duty owed to the state.

dissent,”<sup>42</sup> contends that the “individual militia right”<sup>43</sup> establishes no rights outside the context of formal participation in the state sanctioned militia.<sup>44</sup>

Charles responds to an argument raised in the litigation following *McDonald v. Chicago* that Chicago’s refusal to license shooting ranges violated a Second Amendment right to gather and train and shoot. In an article entitled *The 1792 National Militia Act, the Second Amendment and Individual Militia Rights: A Legal and Historical Perspective*,<sup>45</sup> Charles contends that this argument is flatly wrong.<sup>46</sup> The “individual militia right,” he insists, only attaches after the state has invoked its militia power and actually called an individual into service.<sup>47</sup>

Charles’s arguments offer a vivid example of the mistake at the core of Stevens’s dissent. Following theorists like Charles and historians who fail to distinguish between duty and right, Stevens and other critics of *Heller* plunge into a formulation of the individual right to arms that is a *carbon copy of militia duty*.

The incoherence of the so called “individual militia right” is illustrated by Charles’s various proposed historical examples of its operation and boundaries. He asserts that the scope of this right can be understood by reference to the text, operation, and legislative history of the 1792 Militia Act.<sup>48</sup> The problem throughout is that his illustrations of the “individual militia right” in action are quite clearly duties that, when cast as rights, are just nonsense.

Core examples of the “individual militia right” in operation would require us to believe that one can be penalized for failing to exercise a right. Charles explains that, “[t]he First and Second Congresses respected the States’ authority to ‘arm’ the militia, giving them latitude to establish the *rules, penalties, and fines* by which

---

42. Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment and Individual Militia Rights: A Legal and Historical Perspective*, 9 GEO. J. L. & PUB. POL’Y 323, 323 n.\* (2011).

43. The Article, as the title demonstrates, attempts to elaborate on the content of the individual militia right, or, more accurately, to show that the right does not mean individuals may gather and train and shoot in a way that would approximate something useful to the common defense. *Id.* at 380.

44. *Id.*

45. *Id.* at 323.

46. “The argument that the people have an independent right to associate as militias fails, however, when comparing it to the actual text of the 1792 National Militia Act.” *Id.* at 380.

47. *Id.*

48. *Id.* at 328.

2012]

*RIGHTS VERSUS DUTIES*

1515

individuals were to have arms.”<sup>49</sup> Penalties attached for a variety of infractions. For example, the state could demand a “uniformity of arms”—e.g., that “all muskets . . . be bores [sic] sufficient for balls of the eighteenth part of a pound.”<sup>50</sup> So here, the supposed “individual militia right” would subject citizens to penalties for failure to purchase and maintain the type of arms and ammunition dictated by the state. This of course is a state command, backed by the threat of penalties. It is not a right.<sup>51</sup>

Recall Charles’s flat dismissal of the idea that the “individual militia right” could be exercised outside of formal militia service. One of his basic examples of the “individual militia right” supposedly in operation focuses on the transition that occurs when citizens enter militia service: “[W]hen a man assumes a Soldier, he lays aside the Citizen, & must be content to submit to a temporary relinquishment of some of his civil [r]ights.’ Martial law and military discipline were of particular importance, for without both the men where nothing but an ‘armed Rabble.’”<sup>52</sup> Again, this elaboration of the supposed “individual militia right” shows that it is no right at all. Rather, the illustration shows that upon entering militia service, one is *obligated* to surrender a variety of rights, and might be required to risk and even sacrifice his life.

Charles purports to illuminate the “individual militia right” by referencing the Militia Act debate over age qualification. There were proposals for “including ‘every man between 16 and 60, 65 or 70’” years of age, and on reconsideration the qualifying age range was settled at 18 to 45.<sup>53</sup> Charles thinks this state control over admission to the militia helps to define the scope of the “individual militia right.”<sup>54</sup> But the mistake is plain. While this kind of filter on participation is consistent, as Scalia notes, with an organization over which the state has plenary authority, it is plainly incompatible with any conception of rights. It is a strange right indeed that can be

---

49. *Id.* at 332 (emphasis added).

50. *Id.* at 333 (quoting Militia Act of 1792, ch. 33, 1 Stat. 271, 272 (1792) (repealed 1903)).

51. *See id.* at 332-33.

52. *Id.* at 335 (citing 3 AMERICAN ARCHIVES: DOCUMENTS OF THE AMERICAN REVOLUTION, 1774-76, ser. 4, at 1164 (Peter Force, ed., 1833-46); 5 THE PAPERS OF JOHN ADAMS 13 (Robert J. Taylor, ed., 1833-46)).

53. Charles, *supra* note 42, at 336 (quoting House of Representatives, On the Militia Bill, Dec. 23, 1790, *reprinted in* FED. GAZETTE & PHILA. DAILY ADVERTISER, Jan. 3, 1791, at 2).

54. *See id.*

limited under the state's full discretion to exclude the 46 year old, no matter how fit, or the 17 year old, no matter how mature, the 25 year old who happens to be gay, or anyone else, for that matter, as state agents see fit.

Charles's citations to the legislative history of the Militia Act are similarly telling. The legislative record he invokes shows that the drafters of the Militia Act certainly appreciated that they were discussing duties rather than rights. In two central illustrative paragraphs, Charles's elaborations of the "individual militia right" are entirely about duty. He starts with a quote from Hugh Williamson, who declares, "[E]very man must do his share of the *duty*, imposed by the civil compact,' since maintaining 'our liberties and properties' requires an 'efficient militia.'"<sup>55</sup> Representative A. Michael Stone concurs, "[E]very man who has joined our government is bound to the performance of militia *duty*."<sup>56</sup> Representative William Giles said, "[T]he purpose of the militia bill 'was to make the law so general as to operate on all the citizens of the union, within a certain description of age and constitution, and *oblige* them to render their personal services.'"<sup>57</sup> Charles invokes these statements as framing the "individual militia right," but each and every statement is, quite clearly, an articulation of duty.

Charles argues that the broad, final content of the Militia Act also defines the "individual militia right." But as purported illustrations of an individual right, the examples he cites are nonsense. The act posed "(1) fines on persons that did not provide the proper arms and accoutrements, (2) exemptions for poor persons, and (3) exemptions for persons scrupulous to arms bearing."<sup>58</sup> All of these plainly delineate, and limit, obligations on which the state could insist. The provisions for enforcing these obligations underscore the absurdity of casting these commands as rights. Charles would have us believe that the person subjected to fines for failure to comply is actually exercising his constitutionally protected "individual militia right."

---

55. *Id.* at 338 (quoting House of Representatives, On the Militia Bill, Dec. 1, 1790, reprinted in N.Y. DAILY GAZETTE, Jan. 3, 1791, at 2) (emphasis added).

56. *Id.* at 339 (quoting House of Representatives, On the Militia Bill, Dec. 24, 1790, reprinted in FED. GAZETTE & PHILA. DAILY ADVERTISER, Jan. 10, 1791, at 2) (emphasis added).

57. *Id.* (quoting House of Representatives, On the Militia Bill, Dec. 16, 1790, reprinted in N.Y. J. & PATRIOTIC REG., Jan. 13, 1791, at 1) (emphasis added).

58. *Id.* at 341.

2012]

*RIGHTS VERSUS DUTIES*

1517

Charles' other purported elaborations of the "individual militia right" in operation exhibit the same problem:

[Those] who shall neglect to appear, when warned pursuant to law, at the company meeting or rendezvous, not having a sufficient excuse, shall forfeit and pay the sum of fifty cents; and for appearing . . . without arms . . . *shall pay the sum of twenty-five cents*; and for the like offences at a . . . meeting or rendezvous . . . shall forfeit and pay the sum of one hundred cents . . .<sup>59</sup>

The theme of duty continues in the examples that Charles draws from the rules that govern those exempt from the militia duty. Those "exempted from personal service in the militia . . . *shall pay* an annual tax of two dollars into the public treasury of the United States, to be applied towards the support of the civil government thereof . . ."<sup>60</sup>

Whether in the eighteenth or the twenty-first century, the idea of a right that subjects one to a civil fine is hard to fathom. But the individual militia right, we are told, is manifest in fines levied by both the federal and state governments. "[U]pon Congress enacting the National Militia Act, most States amended their militia laws by assessing fines. While some States assessed fines for non-compliance, [others] made exemptions for persons unable to afford the requisite arms."<sup>61</sup>

The individual militia right also evidently includes an enforceable demand to appear, as illustrated by Charles's invocation of the initial introduction of the Militia Act: "[E]ach company of the militia . . . shall rendezvous four times in every year."<sup>62</sup> This is easily understood as a command. As a right, it is nonsense.

From these examples, it should be no surprise that Charles's general formulation of the "individual militia right" defies efforts to extract anything exhibiting the characteristics of a substantive individual right that would limit government power in any way. Witness his general distillation of the "individual militia right":

---

59. *Id.* (quoting A Bill More Effectually to Provide for the National Defense, by Establishing a Uniform Militia Throughout the United States, *reprinted in* MD. GAZETTE (Frederick, Md.), Aug. 5, 1790, at 2) (emphasis added).

60. *Id.* (quoting A Bill More Effectually to Provide for the National Defense, by Establishing a Uniform Militia Throughout the United States, *reprinted in* MD. GAZETTE (Frederick, Md.), Aug. 5, 1790, at 3) (emphasis added).

61. *Id.* at 344.

62. *Id.* (quoting A Bill More Effectually to Provide for the National Defense, by Establishing a Uniform Militia Throughout the United States, *reprinted in* MD. GAZETTE (Frederick, Md.), July 29, 1790, at 1) (emphasis added).



[A]ny militia rights to ‘keep and bear arms’ are only individualized as to participating in the national defense and provide constitutional balance. While this right to take part in defending our liberties may strike us as odd today, the right was the very essence of ‘keeping and bearing arms’ as a militiaman.<sup>63</sup>

He further explains that the individual militia right “*articulat[es] the fact that individual citizens capable of performing militia service had a right to take part in defending their liberties.*”<sup>64</sup> In the details, however, it is clear that this conception of the individual right would not limit government one whit and is unrecognizable as an individual right.

Indeed, even those citizens nominally within the state’s arbitrary age range for militia service are still subject to the state’s discretionary assessment of their fitness. Charles explains that ultimately the “individual militia right” only applies to those “able to withstand the physical rigors of militia service, subject one self [sic] to military discipline, support just government, and willfully adhere to the call to arms.”<sup>65</sup>

As we have seen, this “right” also permits individuals to be fined for not appearing and requires that they surrender other civil liberties, subjecting them to full authority of the state, including the obligation to risk and even surrender their lives in combat. This is a prosaic description of civic duty. But it is preposterous to call these things rights.

#### IV. JUSTICE STEVENS CONCURS?

Patrick Charles’s elaborations of the “individual militia right” track the signals Justice Stevens provides in his *Heller* dissent. Explaining the meaning of the right to “keep” arms, Stevens, like Charles, exhibits the confusion of duty and right. The right to “keep” arms he says is explained, for example, by

the *requirement* that militia members store their arms at their homes, ready to be used for service when necessary. The Virginia military law, for example, ordered that “every one of the said officers, non-commissioned officers, and privates, *shall constantly*

---

63. *Id.* at 375 (emphasis added).

64. *Id.* at 365 (emphasis added).

65. *Id.* at 367.

2012]

*RIGHTS VERSUS DUTIES*

1519

*keep* the aforesaid arms, accoutrements and ammunition, ready to be produced whenever called for by his commanding officer.”<sup>66</sup>

Tellingly, Stevens summarizes the evidence this way: “[K]eep and bear arms’ thus perfectly describes the *responsibilities* of a framing-era militia member.”<sup>67</sup> Stevens weaves a stingy, irrelevant right from things that can only be understood as duties. He asks us to embrace a bizarre conception of the right to keep and bear arms that produces only “requirements” and “responsibilities” and empowers commands about what one “shall” do. This is a fine articulation of the militia duty. But it is a farcical articulation of rights.

In an accompanying footnote, Stevens identifies New Jersey, Delaware, and Connecticut laws that demand that a militiaman “*shall also keep* in his Place of Abode one [p]ound of [g]unpowder and three [p]ounds of [b]all; . . . *shall at his own expense, provide* himself with a musket or firelock . . . all in good order . . . under the penalty of forty shillings.”<sup>68</sup> These examples are full of commands. They accurately reflect common militia duties, but as elaborations or examples of rights, they are nonsense.

While historians, unburdened by the pervasive legal distinction between rights and duties, might be forgiven the attempt to pass off a right filled only with duties, Stevens ultimately seems to recognize the dilemma and attempts, rhetorically, to reconcile the conflict. His tactic is brute force.

Stevens rejects the majority’s understanding of the duality within the Second Amendment (a militia prefatory clause stating the reason for codification and a pre-existing individual right that facilitates the militia duty). While he is plainly wrong, his analysis illuminates his confusion of rights and duties. The right to keep and bear arms, he says, “protects only one right, rather than two. . . . [T]he *single right that it does describe is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when necessary.*”<sup>69</sup>

---

66. *District of Columbia v. Heller*, 554 U.S. 570, 650 (2008) (Stevens, J., dissenting) (quoting Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2) (emphasis added).

67. *Id.* at 650-51 (emphasis added).

68. *Id.* at 590 n.12 (emphasis added).

69. *Id.* at 651 (emphasis added). Taken literally, this suggests an individual right to keep military weapons in the home. Perhaps Stevens really does mean that individuals have “*a right to have arms available and ready for military service.*” *Id.* On the other hand, this view is plainly rejected by theorists like Charles whom Stevens appears to channel. See also *Staples v. United States*, 511 U.S. 600, 633-34 (1994) (Stevens, J., dissenting). Stevens’s dissent in *Staples* evinces his view that

Here, Stevens implicitly acknowledges that his illustrations of the individual militia right are not rights at all, but instead examples of duty. This nod to the difference between duties and rights does not slow him down. Two sentences later, he simply collapses the two ideas in a way that emphasizes his analytical error. He summarizes the Second Amendment command this way: “When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right *to use and possess arms in conjunction with service in a well regulated militia.*”<sup>70</sup>

So with a fleeting rhetorical nod to the obvious difference between rights and duties two sentences earlier, Stevens summarizes by collapsing right and duty, to render a “right” that contains no personal autonomy, no limitations on the state, and is filled only with obligations (including risk of life and limb) enforceable by the state through fines and punishments.

Later in the opinion, Stevens repeats the confusion between right and duty. Again, he perfunctorily acknowledges that his examples only describe duties, but in another exercise of brute force, blithely claims that the boundaries of militia service fully delineate *both duty and right*. Referencing Madison’s first draft of the Second Amendment (which included a provision that no person religiously scrupulous of bearing arms shall be compelled to render military service in person), Stevens argues “[i]t confirms an intent to describe a duty as well as a right, and it unequivocally identifies the military character of both.”<sup>71</sup>

Another telling instance of Stevens’s confusion of duties with rights appears in his assessment of proposals from North Carolina and Virginia providing “that any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.”<sup>72</sup> Stevens argues that such a provision shows a plain military context, emphasizing that “[t]he State simply does not compel its citizens to carry arms for the purpose of private ‘confrontation,’ or for self-defense.”<sup>73</sup> And this, ironically, underscores his continuing mistake. Because the far more telling

---

military-grade weapons are especially dangerous and are properly subject to stringent regulation under the National Firearms Act that prevents most people from owning them.

70. *Heller*, 554 U.S. at 651 (Stevens, J., dissenting) (emphasis added).

71. *Id.* at 660.

72. *Id.* at 661 (emphasis omitted).

73. *Id.*

2012]

*RIGHTS VERSUS DUTIES*

1521

thing is that the state does not “compel” its citizens to exercise individual rights. The state certainly may enforce militia duties by compulsion. But neither that fact, nor the endless repetition of it, can transform a militia *duty* into a coherent, substantive “*individual militia right*.”

Beyond the boundaries of Stevens’s dissent, the incoherence of the “individual militia right” is underscored when we extend the confusion of rights and duties to familiar places. The *freedom to worship* becomes a *duty* to worship. The *freedom of assembly* becomes the *duty* to assemble. The right to the ballot can be enforced as a formal legal obligation. And in every case, those who fail to fully and properly exercise these “rights” would be subject to whatever fines, penalties or punishments the state decides to impose. Enforcement of such obligations would undoubtedly render numerous social benefits. And just as with the “individual militia right,” we could explain all of these things nicely as important aspects of civic virtue, vital to a vibrant republican community. But it would be a glaring absurdity to call any of these things *rights*.

#### V. A NOTE ABOUT COUNTING AND SOME LESSER-KNOWN VERSIONS OF THE HOLLOW SECOND AMENDMENT

It is not entirely accurate to call the individual militia right version 2.0 of the attempt to empty the Second Amendment of content. Counting the work of other historians and anti-Standard Model theorists, it is in fact at least version 7.0 of the hollow Second Amendment. The summaries below frame the “individual militia right” within the context of its intellectual cohorts.

##### A. A Leading Historian Says the Second Amendment Means Nothing at All

For a time, the moderately sophisticated skeptic would argue that the Second Amendment to the United States Constitution really meant nothing at all. It is a startling claim about a provision of our vaunted Bill of Rights. But in 1975, the American Bar Association put it this way: “It is doubtful that the Founding Fathers had any intent in mind with regard to the meaning of this Amendment.”<sup>74</sup> A similar view was advanced in 1995 by historian Gary Wills who, after criticizing standard modelers, then had to explain what the Second

---

74. Ben R. Miller, *The Legal Basis for Firearms Controls*, 100 ANN. REP. A.B.A. 1052, 1052 (1975).

Amendment actually meant. Wills claimed that it really was just a clever ruse by Madison that actually had no real meaning:

Why, then, did Madison propose the Second Amendment? For the same reason that he proposed the Third, against quartering troops on the civilian population. That was a remnant of old royal attempts to create a standing army by requisition of civilian facilities. *It had no real meaning* in a government that is authorized to build barracks, forts, and camps. But it was part of the anti-royal rhetoric of freedom that had shown up, like the militia language, in state requests for amendments to the Constitution. . . . Madison knew that the best way to win acceptance of the new government was to accommodate its critics on the matter of a bill of rights. . . . Madison confided to a friend: “It will kill the opposition everywhere.” Sweet-talking the militia was a small price to pay for such a coup . . . .<sup>75</sup>

Wills’ vision of the Second Amendment as a meaningless ruse never really caught on with courts, which have strong traditions against dismissing statutory and constitutional provisions as meaningless.<sup>76</sup> Its main appeal was to allow otherwise thoughtful people to dismiss individual rights claims and the standard model for another decade or so. As with the “individual militia right,” there was minimal concern about establishing an affirmative account of the Second Amendment.

### B. The “Real” but “Secret” Meaning of the Second Amendment

In a 1998 article entitled *The Hidden History of the Second Amendment*, Professor Karl Bogus claimed that the Second Amendment actually “was written to assure the Southern states that Congress would not undermine the slave system by using its newly acquired constitutional authority over the militia to disarm the state militia and thereby destroy the South’s principal instrument of slave control.”<sup>77</sup> On this account, not only is the Second Amendment

---

75. Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS (Sept. 21, 1995) (emphasis added), available at <http://www.nybooks.com/articles/archives/1995/sep/21/to-keep-and-bear-arms/>.

76. See, e.g., *Corley v. United States*, 556 U.S. 303, 324–26 (2009) (discussing “the antisuperfluity canon”).

77. Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 321 (1998).

2012]

*RIGHTS VERSUS DUTIES*

1523

irrelevant in our modern world, it also deserves the same disdain as other constitutional accommodations of slavery.<sup>78</sup>

### C. A Narrow Definition of Militia Exposes the “Individual Militia Right”

In an article from 2000, Professor Bogus also illustrates something that should already be evident in the comparison between Stevens’s dissent and the earlier work of the lower federal courts.<sup>79</sup> The weakness of the responses to the Standard Model is not just that there are so many different ones. More so, the problem is that the alternatives themselves are in conflict. Reflecting an earlier generation of opposition to the Standard Model, Bogus actually underscores the core flaw of the supposed “individual militia right.” Militia, says Bogus,

is defined in the Constitution itself. The founders disagreed about how the militia ought to be organized. . . . However, they agreed as a constitutional matter to leave this up to Congress. . . . Thus, the militia is what Congress decides it is, regardless of whether it differs from an eighteenth century model. Currently the militia is indisputably the National Guard because Congress has so decided.<sup>80</sup>

Now compare Patrick Charles’s assessment that the individual militia right articulates “*the fact that individual citizens capable of performing militia service had a right to take part in defending their liberties.*”<sup>81</sup> Charles tries to make this sound something like a right that can be exercised by anyone with the physical ability to serve. Bogus, however, candidly acknowledges the point that fueled Scalia’s critique that a right to participate in an organization over which Congress has plenary authority is an absurdity.<sup>82</sup> The militia, says

---

78. *Id.* (“In effect, the Second Amendment supplemented the slavery compromise made at the Constitutional Convention in Philadelphia and obliquely codified in other constitutional provisions.”).

79. According to Stevens, “Surely it protects a right that can be enforced by individuals.” *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting). According to *Tot* and the many cases that follow it, “[The Second Amendment] was not adopted with individual rights in mind, but as a protection for the states in the maintenance of their militia organizations against possible encroachments by the federal power.” *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942).

80. Carl T. Bogus, *The History of Second Amendment Scholarship*, in *THE SECOND AMENDMENT IN LAW AND HISTORY: HISTORIANS AND CONSTITUTIONAL SCHOLARS ON THE RIGHT TO BEAR ARMS 7* (Carl T. Bogus ed., 2000).

81. Charles, *supra* note 42, at 365 (emphasis added).

82. See *supra* notes 27–28, 80 and accompanying text.

Bogus, is whatever Congress says it is—today the National Guard, tomorrow nothing at all—revealing in a different way that the “individual militia right” has no constitutionally protected content.<sup>83</sup>

#### D. Collective Rights: A Gloss on States’ Rights

Within the case law, some courts pressed the states’ rights view discussed *infra* in *Tot*.<sup>84</sup> But others took the view that the Second Amendment was some sort of “collective right.”<sup>85</sup> This approach attempted to finesse the fact that the right extended to the “people,” by saying that it established a “collective right of the militia . . . limited to keeping and bearing arms, the possession or use of which ‘at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia . . . .’”<sup>86</sup> In practical application, this collective right extended to the people not as individuals, but as an organized political group—i.e., the state.<sup>87</sup>

#### E. A Second Amendment Hollowed Out by Neorepublicanism

In 1991, David Williams published in the *Yale Law Journal* yet another rendition of the hollow Second Amendment. This time the argument was grounded in republicanism:

Creating or maintaining a republic against the constant risk of corruption by particularistic interests is therefore the most difficult of tasks. Republican theory, however, offers some structures to aid in this task, prominent among them the universal militia.

. . . .

From this republican perspective, the error of those who today seek to guarantee a private right to arms is that they would thereby consign the means of force to those who happen to possess firearms—a partial slice of society—rather than to the whole people assembled in militia. . . . At a minimum, therefore, any modern version of this militia must be so inclusive that its composition offers some meaningful promise that it will not become the tool of a slice of society, as it could in the case of those who decide for private reasons to buy a gun or to become members of the national guard.

---

83. *See supra* note 75 and accompanying text.

84. *See supra* note 14 and accompanying text.

85. *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976).

86. *Id.*

87. *See id.*

2012]

*RIGHTS VERSUS DUTIES*

1525

. . . .

As we today have no such universal militia and no assurance that contemporary arms-bearers will be virtuous, the Second Amendment itself is—for now—outdated.<sup>88</sup>

Williams rendered the Second Amendment only temporarily hollow, leaving the right to arms contingent on the revival of a kind of virtuous citizenry to which presumably he would alert us, if it arose. Until then, “the Amendment has little or no direct meaning for judges.”<sup>89</sup>

### F. A Prize Winning Historian Says American Gun Culture (and Thus the Right to Arms) Is Myth

In 2000, to accolades and awards, historian Michael Bellesiles attempted to empty the Second Amendment of content with the claim that, historically, Americans never really owned many guns, and thus by implication had no real expectation of a robust right to arms.<sup>90</sup> Claims of an individual right to arms therefore could not be plausibly rooted in history and were really just modern constructions of the gun rights lobby.<sup>91</sup> Bellesiles won the Bancroft prize (“considered one of the most distinguished academic awards in the field of history”)<sup>92</sup> for the effort. Subsequently, it came to light that Bellesiles had fabricated and misstated much of his data and his book was withdrawn and pulped and his Bancroft prize rescinded.<sup>93</sup> Gary Wills, who had given the book a rave review in *The New York Times*, later said that he and others were “taken” by Bellesiles.<sup>94</sup> “. . .” Individual rights skeptics seemed to have abandoned the Bellesiles version of the hollow Second Amendment.<sup>95</sup>

---

88. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 553–54 (1991).

89. *Id.* at 615.

90. See MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* 5 (Alfred A. Knopf ed., 2000).

91. See *id.* at 13.

92. *Winners of the Bancroft Prize Announced*, COLUMBIA UNIV. LIBRARIES (Mar. 14, 2012), [http://library.columbia.edu/content/libraryweb/news/libraries/2012/20120314\\_bancroftprize.html](http://library.columbia.edu/content/libraryweb/news/libraries/2012/20120314_bancroftprize.html).

93. See JOHNSON, ET. AL., *supra* note 21, at 109-10.

94. *In Depth with Garry Wills*, C-SPAN VIDEO LIBRARY, at 2:05:30 (Jan. 2, 2005), <http://www.c-spanarchives.org/program/184749-1> (“After all, [Bellesiles’ book] had been given a very prestigious award and the Judges were taken. . . . [H]e was a practicing historian with good credentials up to that point.”).

95. Also contradicting Bellesiles’ claim about the lack of concern about a right to arms is the basically continuous enshrinement of a right to arms in state constitutions



### G. The Tally

The definitive list of “Hollow Second Amendment” theories remains to be completed and some may quarrel with my categories. By my count, the “individual militia right” is at least version 7.0 of the effort to flush any content from the “right of the people to keep and bear arms”.

### CONCLUSION

One wonders what Justice Stevens was thinking as he fashioned his *Heller* dissent to advance the “individual militia right.” Did he consider and dismiss other ways of rejecting a meaningful individual right to arms? What did or would he answer, when asked for an example of the individual militia right in operation? Would he tick off a list of things that can only be understood as duties, rendering the right empty, incoherent, and earning Scalia’s chide that the proposition is “worthy of the [M]ad [H]atter?”<sup>96</sup>

*Heller* skeptics evidently are prepared to advance the “individual militia right” as clearly the best reading of the Second Amendment. This willingness to embrace a view so inherently vexing and devoid of content brings to mind the comment of a partisan pundit in one of the recent campaigns. Confessing to an unhealthy bias against one of the candidates, the talking head admitted that if the alternative were Daffy Duck, then Daffy Duck was his man.

The opposition to the individual right to arms is similar. The initial attempt to empty the Second Amendment of content required one to believe that “right of the people” really meant “right of the states.” Numerous lesser efforts followed. The currently preferred alternative—version six, seven, eight, or perhaps higher, depending on how you count—transforms a duty into an “individual militia right” that has no characteristics of a right and yields nothing that is enforceable as a right. How many tries are allowed before the enterprise loses credibility?

---

and the colonial arms laws that actually required firearms ownership. See JOHNSON, ET. AL., *supra* note 21, at 101-10.

96. See *District of Columbia v. Heller*, 554 U.S. 570, 589 (2008) (“The right to carry arms in the militia for the purpose of killing game is worthy of the mad hatter.” (internal quotation marks omitted)).